NO. 22683

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAUL DIXON LEWIS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.



# APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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## TABLE OF AUTHORITIES

Statute

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# APPELLEE'S BRIEF

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## I

## STATEMENT OF ISSUES

Appellant's Opening Brief raises the following issues:

1. Was trial counsel appointed for appellant incompetent?
2. Does appellant have standing to assert errors allegedly committed against his codefendant and wife?
3. Was appellant prejudiced by the failure of the Government to present a requested list of witnesses?
4. Was the appellant prejudiced by the testimony of an eyewitness presented in rebuttal rather than in the Government's case-in-chief?
5. Was the appellant prejudiced by the Government's

request that his codefendant, on cross examination, don a jacket alleged to have been worn by the codefendant during the robbery?

6. Was the search and seizure of the "get-away" automobile illegal so to render the fingerprint obtained therefrom inadmissible?

7. Were the statements taken from appellant's codefendant the product of an unconstitutional interrogation and, thus, the arrest of appellant illegal?

8. Was the appellant entitled to representation of counsel during a "photo spread" shown to some of the identifying witnesses?

9. Was appellant prejudiced by his testimony that he was not advised of his constitutional rights, and, thereafter, no statements made by him were introduced?

10. Was appellant prejudiced by the jury's hearing that he had been convicted of a misdemeanor?

11. Were the jury instructions rendered by the court so erroneous and misleading as to destroy appellant's right to have a fair trial?

12. Was the participation of the court in the trial such as to deprive appellant of a fair trial?

13. Did the impeachment of the appellant's wife through the use of her own statements made to FBI agents

violate the defendant's constitutional rights?

14. Did the court incorrectly consider deterence when sentencing the appellant?

II

## STATEMENT OF FACTS

On October 27, 1967, the appellant and two other men entered the Manchester and Vermont Branch of the Bank of America. The appellant was dressed in a postal carrier's uniform and carried a pistol (R. T. 1/ pp. 97 and 105). Appellant's codefendant William Kier was wearing a noticeable pair of blue tennis shoes and also carried a pistol (R. T. pp. 97 and 104). The third man carried a sawed-off shotgun covered with an empty bread wrapper, and positioned himself at the front door of the bank (R. T. p. 101).

After so entering the bank, it was announced that the bank was being held up. While the appellant covered the interior of the bank with his pistol, William Kier took his mail pouch and emptied the cash drawers (R. T. p. 98). He also placed his pistol at the head of the bank manager to insure his cooperation (R. T. pp. 96 and 212).

During the course of the robbery, the appellant was observed by at least five eyewitnesses: Charmaine A. Brindley

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1/ Refers to Reporter's Transcript.

(R. T. pp. 93-135); Mary Brown (R. T. pp. 136-151); Wavellyn Calhoun (R. T. pp. 151-161); Ruthie Mae Brown (R. T. 195-209); and Mr. Campbell Thompson (R. T. pp. 209-224).

When Mrs. Ruthie Mae Brown entered the bank through the back door, the appellant pointed his pistol at her and told her to "Get over there" (R. T. p. 197). Mr. Campbell Thompson had just left one of the teller's windows when the appellant told him to "Hold it right where you're at" (R. T. p. 211), and later told him to "Turn around and look the other way" (R. T. p. 214).

During the course of the robbery the Los Angeles Police had been alerted and upon arriving at the scene they burst through the front doors of the bank firing their weapons (R. T. p. 102). In the hail of bullets, the robber with the shotgun was killed instantly (R. T. p. 207). Codefendant William Kier slipped into a side room and later was seen hastily leaving the bank (R. T. p. 571). The appellant, proceeded to leave by the back door of the bank. As he stepped out into the alley he was met by John Cartelli (R. T. p. 164) to whom he said, "Hurry, hurry, man there are some more inside" (R. T. p. 164). The appellant held the door open for Mr. Cartelli, and, thereafter, scampered down the alley to the street where he was confronted by Mr. Edward LeSage. LeSage asked the appellant, "What's going on?" and the appellant replied "I don't know, but I'm getting the hell out of here" (R. T. 238-39). The appellant then entered a blue Corvair automobile and drove away (R. T. p. 239). LeSage was able to observe the letters "FFS" on the license plate (R. T. p. 240). He thereafter gave the

description of the appellant, the automobile, and the license plate letters to an F. B. I. agent (R. T. p. 240).

Mr. Orly A. Leeson, a special agent of the F. B. I. observed a blue Corvair automobile with the letters "FFS" on the license plate parked five blocks away from the bank at approximately 11:50 A. M. (R. T. p. 249). The license plate had been taped over the actual plate (R. T. p. 250). Leeson also observed that a quantity of loose bread was in the back seat of the vehicle (R. T. p. 252).

Subsequently, fingerprints were taken from the automobile and the tape surrounding the license plate. One of the appellant's fingerprints was found on the tape (R. T. pp. 284, 303-304). Furthermore, a postal card found inside the bank bore one of appellant's fingerprints (R. T. pp. 263, 300-303).

Appellant's codefendant William Kier was apprehended a few blocks from the bank (R. T. pp. 226-228). He was then advised of his constitutional rights (C. T.[2/] p. 57) and taken down to the Los Angeles Police Department (C. T. p. 57). He was questioned by Sergeant Jack Williams and made statements implicating the appellant (C. T. p. 58).

The appellant was arrested the same night by two F. B. I. agents (R. T. p. 397). The appellant's wife was questioned at a later time and she stated that she had not heard from the appellant during the time that the bank was being robbed (R. T. p. 565).

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2/ Refers to Clerk's Transcript

III

## ARGUMENT

Taking the appellant's rather lengthy brief in a broad overview it would seem that it can be divided into three more or less distinct parts.

The first part consisting of subheading "A" is an allegation by appellant that his counsel at trial was incompetent, and, therefore he should be given a new trial with competent counsel. The reader is invited to consider the entire brief and record as substantiating his contentions.

The second part is composed of a series of alleged instances of misconduct directed toward the appellant's codefendant and wife which the appellant asserts seriously infected his case.

The third part consists of alleged errors committed by law enforcement officials, Government counsel and the court directly against the defendant. This part can be broken down into errors which were objected to at trial and those which were not raised.

Appellant would have this Court believe that the various errors are so egregious that the whole trial reeks with misconduct. After reading appellant's brief one could only draw the conclusion that his trial is only matched in legal history by the Star Chamber. This is not the case.

A. TAKING THE RECORD AS A WHOLE APPELLANT'S TRIAL COUNSEL WAS NOT INCOMPETENT, AND APPELLANT'S QUARREL LIES WITH TRIAL STRATEGY RATHER THAN ADEQUACY OF REPRESENTATION

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In answer to the allegations set forth in the first section of Appellant's brief (Subheading "A") the Government would cite several cases dealing with incompetency of counsel, a procedure which appellant neglected to follow.

In Brubaker v. Dickson, 310 F. 2d 30 (9th Cir. 1962), cert. denied, 372 U.S. 978, 83 S. Ct. 1110, many of the same allegations raised by appellant were raised. The counsel was appointed, and various allegations of misconduct were made. In summarizing the law on this point this Court stated at 310 F 2d 30, 37:

> "This does not mean that trial counsel's every mistake in judgment, error in trial strategy, or misconception of law would deprive an accused of a constitutional right. Due process does not require errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. Determining whether the demands of due process were met in such a case as this requires a decision as to whether upon the whole course of the proceedings and in all the attending circumstances there was a denial of fundamental fairness; it is inevitably a

question of judgment and degree."

This Court has also stated in Knowles v. Gladden, 378 F. 2d 761 (9th Cir. 1967), that grounds for reversal exist only if the appointed counsel's assistance to the defendant was of such a kind as to shock the conscience of the court and make the proceedings a farce and a mockery of justice.

See also Pinedo v. United States, 347 F. 2d 142 (9th Cir. 1965), cert denied, 382 U.S. 976, 86 S. Ct. 547.

The appellant points out that defense counsel was here appointed by the court and then reaches the absurd conclusion that the Government is estopped from asserting any failure to object to various alleged errors by either that counsel or the appellant. The Government can and will raise the point that the defendant's counsel did fail to pursue some avenues of trial strategy, and will assert that throughout the trial there was never an anguished outcry from the lips of the appellant that he was inadequately represented. Appointed counsel at times have been relieved of their duties for incompetency on motion of the court and/or the defendant. Here no such action was taken by the defendant or court indicating that in fact representation by the appointed defender was capable.

It would seem that appellant's present attorney of record would have conducted the trial in a different manner, but it is submitted by the Government that the basis for this feeling should not be that the appellant was denied due process of law, but that

different lawyers have different ways of trying law suits. In United States v. Pate, 312 F. 2d 161 (7th Cir. 1963), an appellant asserted that his court appointed counsel was so derelict that his trial was rendered a facre and a mockery of justice. The court therein answered his contentions as follows:

> "Petitioner lists a number of purported errors of omission and commission in his counsel's conduct of the case. All of these relate to trial strategy or tactics, and involve elements of discretion and judgment on which skilled and experience advocates might honestly disagree, particularly after the event. 312 F. 2d 161, 162."

The Government would submit that after examining the lengthy record of this case, that appellant's quarrel lies not within the bounds of Constitutional Law or misconduct, but in trial strategy. Further, a consideration of the record reflects that the appellant's attorney represented him ably and with fervor.

## B. ALLEGED ERRORS NOT RAISED IN THE TRIAL COURT MAY NOT BE RAISED FOR THE FIRST TIME ON APPEAL

Prior to the discussion of the appellant's remaining points the Government is compelled to make a rather general statement of the law to avoid repetition throughout the remainder of its brief.

The failure of a defendant to object to the admission of

evidence, the testimony of witnesses, the activities of counsel, and the conduct of the court at trial should constitute a waiver of the right to assert such on appeal.

Good v. United States, 378 F. 2d 934 (9th Cir. 1967);
Duke v. United States, 255 F. 2d 721 (9th Cir. 1958), cert denied, 78 S. Ct. 1361, 357 U. S. 920.

This is true even in areas that may fringe on Constitutional rights since it is the duty of the defendant to make the objections and raise defenses at trial. "Constitutional rights can be, and often are, waived, and this frequently happens in the course of a trial." DeRose v. United States, 315 F. 2d 482, 486 (9th Cir. 1963), cert denied, 84 S. Ct. 99, 375 U. S. 846.

Therefore, many of the points asserted by the appellant here should be denied on the very simple ground that he failed to raise them at trial. However, the Government has chosen to argue in the alternative in case the plain error rule of Federal Rule of Criminal Procedure 52(b) is deemed to apply.

## C. BEFORE APPELLANT MAY RAISE THE ISSUE OF THE VIOLATION OF ANOTHER'S RIGHTS AS BEING A VIOLATION OF HIS RIGHTS, THERE MUST BE A DETERMINATION: (1) THAT SOMEONE'S RIGHTS WERE VIOLATED, AND (2) THAT THE APPELLANT HAS THE STANDING TO ASSERT SUCH VIOLATION

Since the appellant has chosen in subheading "B" to set forth a rather general discussion, the Government would do likewise so that the second part of the appellant's brief can be

viewed through a set framework. The appellant would have the court comb through the files and records of this case, and then take alleged instances of misconduct involving persons other than himself and find that the misconduct infected the appellant's case. These asserted areas of misconduct directed at others but claimed by appellant appear in appellant's subheadings "D", "E", "G" and "M".

The appellant has cited numerous cases, but the Government would submit that most if not all of them miss the mark. Instead, the Government would suggest the following as a method of analysis; (1) Were anyone's rights violated? (2) If so, does the appellant have standing to assert these rights in his own behalf?

Possibly the landmark decision in the area of "vicarious" constitutional rights is that of Jones v. United States, 362 U.S. 257 (1960). The entire basis of the opinion was that of standing to assert Constitutional rights and the court offered a method of analyzing standing cases. Taking a broad overview of the decision and extrapolating from its facts and circumstances the following is found.

(1) There must be a finding that agents of the Government have committed an act that deprived someone of a right, Constitutional or otherwise.

(2) The appellant must then show that in some way his rights have been impaired by the action.

(a) He must be one against whom the alleged action was directed as distinguished from

one who claims prejudice only through the use of evidence gathered as a consequence of an action directed at someone else.

(b) He must belong to the class for whose sake the protection claimed is given.

(c) He must allege and prove he was the victim of an invasion of his personal sanctity or privacy.

See also Warden v. Hayden, 387 U.S. 294 (1967).

The Government would request that the court take this two part test and use it as a binocular lense through which to view each and every assertion of a vicarious right asserted by the appellant.

## D. THE RIGHT TO ALLEGED ERROR RELATIVE TO JOHN H. BOREN'S TESTIMONY HAS BEEN WAIVED, OR IN THE ALTERNATIVE, ADMISSION OF EVIDENCE IN REBUTTAL WHICH PROPERLY SHOULD HAVE BEEN INTRODUCED IN CHIEF IS NOT ERROR IN THIS CASE

Taking the points raised by appellant in the second part of his brief the Government will first discuss the testimony of Mr. John H. Boren raised by appellant in subheading "D". It must first be noted that at no time was there an objection to Mr. Boren's testimony, and, therefore, appellant should be deemed to have waived the right to assert the impropriety of such testimony on appeal for the reasons stated in Section II of this brief.

But, arguing in the alternative, the following can be gleaned

from the record. Mr. Boren was called to the stand in the Government's rebuttal (R. T. p. 570). His testimony covers some nine pages of transcript and consisted primarily of identifying a jacket alleged to have been worn by the defendant William Kier. During the surrebuttal of the defendant Kier (R. T. pp. 588-90) very brief mention was made of clothing.

The impact of the testimony of Mr. Boren can hardly have had the tumultuous effect claimed by the appellant. He said nothing more than what had been previously established by six eye witnesses (i. e., the defendant William Kier was involved in the bank robbery).

The general rule concerning the use of evidence which could have been admitted in a case in chief, but which was saved for rebuttal is stated in Rodella v. United States, 286 F. 2d 306, 309 (9th Cir. 1960), cert. denied, 365 U. S. 889, 81 S. Ct. 1042:

> "The general rule has long been held that whether material evidence (which could have been received as part of the case in chief) should be admitted in rebuttal lies solely within the sound discretion of the trial court."

See also Sabbath v. United States, 380 F. 2d 108 (9th Cir. 1967, cert. denied, 88 S. Ct. 570, 389 U. S. 1003; Samish v. United States, 223 F. 2d 358 (1955), cert. denied, 76 S. Ct. 85, 350 U. S. 848, rehearing denied, 76 S. Ct. 150, 350 U. S. 897.

The court in Rodella, supra, then went on to assume that the evidence in the case should have been admitted in the case-in-

chief and re-emphasized the statement made in Austin v. United States, 4 F. 2d 774 (9th Cir. 1925):

> "[I]t is not prejudicial error to admit testimony in rebuttal which should have been offered as a part of the main case, unless the party against whom the testimony is admitted is denied the right to controvert or contradict it." (Emphasis added)

Turning to the record of the instant case it is again emphasized that the testimony of Mr. Boren was not objected to, and, therefore, the court never had to pass on its admissibility. The court never questioned it on its own. The silence on the part of defense counsel and the court indicates clearly that the evidence was admissible in rebuttal. Further, the defendant Kier was given a chance to controvert the evidence in his surrebuttal and did so briefly (R. T. pp. 588-90).

Therefore, the dictates of the Rodella case are clearly met and there can be no cry from appellant at this time that he was "sandbagged".

## E. CAUSING APPELLANT'S CO-DEFENDANT TO PUT ON A JACKET WORN BY HIM DURING THE ROBBERY WAS NOT PREJUDICIAL AND DID NOT REFLECT ON APPELLANT'S CASE

The Government will concede that the jacket worn by the defendant William Kier was withheld until his cross-examination,

but the Government submits that its admission was not a blinding flash of light from heaven as appellant would have this Court believe in subheading "E". It was another thin level in the pyramid of evidence against the defendant Kier.

1. No Objection Was Made At Trial So The Error Should Be Deemed Waived.

The appellant was never connected with the jacket, and there was no objection to the admission of the jacket (R. T. p. 574) except that not enough foundation had been laid (R. T. p. 538). Therefore, the defendant Kier waived any right to object to the introduction of the jacket, and thereby, surely the appellant did also. See Santoro v. United States, 338 F. 2d 113 (9th Cir. 1967); DeRose v. United States, supra.

2. The Use Of The Jacket was Proper Cross-Examination

It must also be mentioned that when a defendant takes the stand in his own defense he opens himself up to broad cross-examination. Myers v. United States, 390 F. 2d 793, 796 (9th Cir. 1968); DeRose v. United States, supra. Further, a defendant can be compelled to make a living exhibit out of himself without violating any of his rights. Schmerber v. California, 86 S. Ct. 1826, 384 U.S. 757 (1966); Biggers v. United States, 88 S. Ct. 979, 390 U.S. 404 (1968). Therefore, the defendant Kier could be compelled

to put the jacket upon himself and exhibit the garment like a "white broadcloth". There could be no reflection on the appellant's case from this cross-examination technique proper in itself.

Furthermore, the impact of the introduction of the jacket hardly had the effect on the defendant Kier's case that appellant would have the court believe, and had even less, if any, effect on his case. The jacket first appears in the record at R. T. 533 and testimony by Kier relative to it continued until R. T. 538. It reappeared at R. T. 571-578. To view the introduction of the jacket as a tactical thunderclap would be reading far too much into the transcript, and to stretch the issue to the point of saying that appellant's case, through his association with his co-defendant, was prejudicial infected, is to go from the absurd to the ridiculous.

Therefore, because the introduction of the jacket was not objected to, because it was within the scope of proper cross-examination, and because there is no evidence of prejudice to the appellant, appellant's contentions in subheading "E" should be denied.

## F. THE STATEMENTS RECEIVED FROM APPELLANT'S CODEFENDANT WILLIAM KIER WERE OBTAINED WITHIN THE BOUNDS OF MIRANDA v. ARIZONA. THE DEFENDANT CANNOT INVOKE THE DOCTRINE OF "FRUIT OF THE POISONOUS TREE" IN RELATION TO SUCH STATEMENTS

### 1. Failure To Raise The Issue At Trial Should Waive It On Appeal

Once again it must be noted that at trial no motion on the part of appellant was made in relation to the interrogation of the defendant Kier raised in appellant's "G". The appellant did not raise the "fruit of the poisonous tree" ground at any time during trial although several pre-trial motions were made in his behalf at R. T. pp. 28-41. Again, the failure to raise the point at trial should preclude the appellant from raising it now.

### 2. Appellant's Codefendant Was Properly Questioned

But, in any event it is clear from a reading of the affidavits of the various law enforcement officers involved that the defendant Kier's constitutional rights were not violated and so the appellant was not identified and arrested through use of "poison fruit".

The affidavit of the defendant Kier (C. T. p. 27) does not allege any facts and circumstances but states the bald conclusion that "I have been brutally beaten by Los Angeles police officers."

Such a statement should be viewed with a certain amount of suspicion and not taken at face value.

The affidavit of officer Peter Weinhold (C. T. pp. 56-57) indicates that the defendant Kier was advised of all his rights and stated "I choose not to say anything until I contact my attorney." The key affidavit is that of Sergeant Jack Williams (C. T. p. 58) who elicited the incriminating statements and the identification of the appellant from the defendant Kier. The appellant's brief completely twists the wording of that statement to fit his own purposes and the affidavit itself should be read to find what actually happened. The relevant section of the affidavit reads as follows:

> "Arriving at 1:30 P. M., I was directed to a room in which William Emmet Kier was being guarded by a uniformed officer. After introducing myself, I advised Mr. Kier that he had a right to remain silent, that any statements he made could be used against him, that he had a right to have an attorney present during questioning, and that if he could not afford an attorney, one would be appointed for him. I asked Mr. Kier if he understood this, and he replied that he did." (Emphasis added)
> "At no time in the course of our conversation did Mr. Kier indicate he wanted an attorney or that he desired to terminate our conversation." (C. T. p. 58)

Appellant's brief at pages 67-68 summarizes what he

believes to be the relevant facts gleaned from the affidavits, and also the conclusions that can be arrived at from them. However, a reading of the affidavits indicates that he is completely wrong.

The defendant Kier did say that he wanted to consult counsel, but then after being readvised of his rights by Sergeant Williams, he chose to confess. There is no indication from the affidavits that Kier was "misadvised". Rather, the affidavits show that he was correctly advised by Williams and then never chose to terminate the conversation by asking for an attorney or remaining silent. The questioning by Sergeant Williams was completely separate from that of Officer Weinhold and was conducted under the dictates of the decision in Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

Admittedly, the Government has a heavy burden in proving a waiver of the rights insured by the Miranda decision. However, this Court can look to the facts and circumstances of the case and can find a knowing and intelligent waiver.

Payne v. United States, 340 F. 2d 748 (9th Cir. 1965);
Walsh v. United States, 371 F. 2d 135 (9th Cir. 1967),
cert. denied, 388 U.S. 915, 87 S.Ct. 2130;
Narro v. United States, 370 F. 2d 329 (5th Cir. 1966);
Davidson v. United States, 349 F. 2d 530
(10th Cir. 1965);
cf. Pembrook v. Wilson, 370 F. 2d 37 (9th Cir. 1966).

The Government would submit that considering the affidavits upon which the appellant relies so heavily it is clear that the

defendant Kier was fully appraised of his constitutional rights, and that he knowingly and understandingly waived those rights.

### 3. "Fruit Of The Poisonous Tree" Doctrine Does Not Apply To Arrests But To Suppression Of Evidence.

Apparently, the appellant would have this Court take the doctrine of "fruit of the poisonous tree" and apply it to his arrest. However, the Government would submit that this doctrine has nothing to do with arrests, but with the suppression of evidence obtained through constitutional misconduct. Wong Sun v. United States, 83 S. Ct. 407, 371 U.S. 471 (1963), and the literally hundreds of cases based on it all deal with suppression of evidence. The appellant has neglected to cite one case to support his argument, and for very good reason -- there are none.

Therefore, the appellant cannot attack his arrest on the basis of "fruit" stemming from the statements of his codefendant.

## G. THE IMPEACHMENT OF APPELLANT'S WIFE WITH HER OWN STATEMENTS WAS PROPER

### 1. Failure To Raise The Point At Trial Waives It On Appeal

Regarding the issues raised by the appellant in subheading "M", once again no objection was made to the introduction of the statement made by Mrs. Lewis on the grounds of Miranda v. Arizona,

supra, and, therefore, the appellant should be deemed to have waived the right to raise this issue on appeal for the reasons stated in section II.

### 2. Miranda v. Arizona Does Not Apply Here

But in any event the Miranda decision clearly does not apply. Mrs. Lewis was not a suspect (R. T. p. 566) and she was not in custody. Furthermore, she was not a defendant. Any questions asked of her and evidence thus obtained cannot be imputed to appellant merely because Mrs. Lewis was his wife. "It is clear that the common law fiction of the unity of husband and wife has no place in modern criminal law." Kivette v. United States, 230 F. 2d 749 (5th Cir. 1956), cert. denied, 78 S. Ct. 419, 355 U. S. 935; United States v. Dege, 364 U. S. 51, 80 S. Ct. 1589 (1959).

### 3. Witnesses Can Be Impeached With Statements Implicating A Defendant

It has been held that a defense witness can be impeached by a prior statement that necessarily implicates the defendant, even if the statement is taken under circumstances of an arrest, if the statement is limited to impeachment. Williams v. United States, 394 F. 2d 821, 822 (5th Cir. 1968). Even evidence that has been obtained by possible constitutional improprieties might be used, and a defendant's constitutional rights are not thereby violated.

Battaglia v. United States, 349 F. 2d 556, 560 (9th Cir. 1965).

Therefore, the appellant's point, relative to the necessity for Miranda warnings before a prior statement of Mrs. Lewis can be used to impeach her, has no basis.

### 4. Failure To Object Waives The Husband-Wife Privilege

A more interesting point is raised incidentally by the appellant when he claims that the Government was able to introduce something through its agents which it could not have done through Mrs. Lewis (prior statement) because of the husband-wife privilege of not having to testify against the other.

The privilege of husband and wife not to testify against one another is a dual privilege which may be claimed by either spouse, United States v. Mitchell, 137 F. 2d 1006 (2nd Cir. 1943). Either the husband or the wife may object if the other testifies, Hawkins v. United States, 358 U. S. 74 (1958). However, this is a rule of privilege and the privilege may be waived, Peek v. United States, 321 F. 2d 934 (9th Cir. 1963). By allowing his wife to testify in his behalf a defendant must accept the risk as well as the benefit that might result from her testimony, United States v. Moorman, 358 F. 2d 31 (8th Cir. 1966), and a defendant who consents to the direct examination of his wife cannot rely on the privilege to bar all cross-examination, People v. Odmann, 160 Cal. App. 2d 693, 325 P. 2d 495 (1958). Therefore, a defendant waives the privilege

when he places his spouse on the stand. This is so even when the out-of-court statements of the wife are used to impeach, and such statements have the effect of testifying against the husband, Olender v. United States, 210 F. 2d 795 (9th Cir. 1954).

Therefore, the appellant waived his right to assert the husband-wife privilege when he put his wife on the stand to testify in his behalf. He further waived the privilege by failure to object to the impeachment techniques of the Government.

## H. ERRORS ALLEGED TO DIRECTLY VIOLATE THE APPELLANT'S RIGHTS

Within the confines of what the Government has chosen to label the third part of the appellant's brief are those alleged errors which the appellant feels were committed directly against him. These alleged errors appear in subheading "C", "F", "H", "I", "J", "K", "L", and "N". Some of the alleged errors were objected to at trial, but many of them were not and should be deemed waived.

## I. THE GOVERNMENT IS NOT REQUIRED TO PRODUCE A LIST OF WITNESSES, AND, IN ANY EVENT, THE WITNESSES DESIRED BY APPELLANT WERE IRRELEVANT TO THE CASE.

In response to the appellant's assertions under subheading "C" it must be noted that this subject was incorporated in a pretrial motion. A hearing was had on the motion (R. T. pp. 36-42) after

which the motion was denied (R. T. p. 41).

Nowhere in the United States Code is the Government compelled to produce a list of witnesses except in treason and capital cases (18 U. S. C. 3432). It has been held that the Government is not compelled to produce the names of witnesses who may or may not have been eyewitnesses to the crime.

United States v. Westmoreland, 41 F. R. D. 419 (1967);
United States v. Turner, 274 F. Supp. 412 (E. D. Tenn. 1967);
United States v. Margeson, 261 F. Supp. 628 (E. D. Penn. 1966);
Smith v. United States, 216 F. Supp. 809 (S. D. Cal. 1961).

But the appellant would have this Court take the decision in Brady v. Maryland, 373 U. S. 83 (1966), and apply it to his instant demands. The Brady case speaks in terms of suppression of favorable evidence, and the government will concede that such evidence must be revealed.

Therefore, it must be determined whether the evidence that the defendant desires is "favorable". The defendant, admittedly, does not want the names of persons who can say "Yes, that is the man," and he does not want the names of persons who can say "No, that is not the man." Rather, the appellant requests the names of persons who can only say, "I don't know if that's him or not." And the government submits that this type of statement is not only not favorable to the appellant, it is just not relevant at all.

If a witness cannot testify one way or the other, it would seem his testimony is completely irrelevant, and would serve no purpose. If anything, such testimony would consume precious time and confuse the jury. Trial judges are constantly attempting to expedite the presentation of criminal cases, and to compel the court to order the revelation of witnesses who cannot say anything one way or the other borders on the absurd. A person called in from the street could testify as well as those requested by appellant.

Therefore, it should be held that such witnesses are not favorable to the defense, that the production of their names would serve no good purpose, and that the government, therefore, did not err in withholding the names of such witnesses.

## J. UNDER THE CIRCUMSTANCES, THE SEARCH AND SEIZURE OF THE AUTOMOBILE IN WHICH APPELLANT MADE HIS ESCAPE WAS REASONABLE

### 1. Failure To Object At Trial Waives The Error On Appeal

The appellant next raises the Constitutionality of the search of the automobile in which he escaped from the vicinity of the bank robbery. It must first be mentioned that nowhere in the record does there appear any motion to suppress or dismiss based on the illegality of the search nor was there an objection at trial to the admission of the fingerprint that was found as a result of the search. Therefore, the appellant should be deemed to have waived

this defense for reasons stated supra. But, once again, if the appellant be deemed not to have waived the defense, the government would submit that the search and seizure was not illegal.

2. Search And Seizure Of The Automobile Was Reasonable.

The standard to be used in determining whether a search and seizure of a motor vehicle is within the proscribed limits of the Fourth Amendment is whether the search and seizure was reasonable. Carroll v. United States, 267 U.S. 132, 146-47 (1925); Preston v. United States, 376 U.S. 364, 366 (1964); Cooper v. California, 386 U.S. 58, 61 (1967).

Whether a search and seizure of a motor vehicle without a search warrant is reasonable is determined by two factors: (1) the circumstances surrounding the finding and location of the automobile, and (2) whether there existed at that time probable cause to search the vehicle.

Under some circumstances law enforcement officials are justified in removing a vehicle from a public highway for the possible seizure of evidence and the fruits of a crime until they can obtain a warrant, United States v. Radford, 361 F. 2d 777 (4th Cir. 1966). The circumstances usually justifying such a search have their genesis in expediency, such as when a bank has just been robbed and the law enforcement officials are attempting to locate a robber still at large, Caldwell v. United States, 338 F. 2d 385

(8th Cir. 1964), or when there is a possibility that the money from the robbery will not be recovered, Boyden v. United States, 363 F. 2d 551 (9th Cir. 1966).

Probable cause is also determined by the circumstances of each case. It exists where:

> "[T]he facts and circumstances within their (law officers) knowledge and of which they had reasonably trustworthy information were sufficient in themselves to warrant a man of reasonable caution in the belief that an offense had been committed."

Brineger v. United States, 338 U. S. 160, 175-76 (1949) citing Carroll v. United States, supra.

What may be an unreasonable search of a house may be reasonable in the case of a motorcar. Preston v. United States, supra at 366. And, again, each case must be considered on its facts to determine whether the search and seizure was reasonable. As the Supreme Court has stated recently, Cooper v. California, supra at 62:

> "It is no answer to say that the police could have obtained a search warrant, for "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." United States v. Rabinowitz, 339 U. S. 56, 66.

It is now incumbent upon this Court to look at the

circumstances of this case to determine: (1) whether the finding of the automobile was framed in expediency, and (2) whether there existed probable cause to search the automobile at that time. Edward LeSage testified that at approximately 11:20 A. M. within seconds after the robbery, he spoke to the appellant on the street outside the bank (R. T. p. 238). Further, he testified that he observed the appellant enter the Corvair (R. T. p. 240), and managed to record the letters "FFS" in the license plate (R. T. 240). He then relayed this information to an FBI agent (R. T. p. 240).

Apparently, the full description of the Corvair was broadcast to FBI agents cruising in the area of the bank because agent Orly A. Leeson testified that at 11:50 A. M. he observed a blue Corvair with the partial license number "FFS" parked (R. T. p. 249). He noted the license plate bearing the letters "FFS" had been taped over another license plate attached to the automobile (R. T. P. 250). After observing the registration, he also noticed that there was a large quantity of loose bread in the back seat of the automobile (R. T. p. 252). One must remember that the slain robber concealed his shotgun in a bread wrapper (R. T. pp. 101, 215).

Thereafter, the testimony relative to the Corvair changed to a discussion of the removal of the fingerprints from various areas of the body. Specifically, William H. Williams from the City of Los Angeles, Scientific Investigation Division, Latent Fingerprint Section, testified relative to his removal of the fingerprint from the piece of grey tape surrounding the license plate (R. T. p. 271). This removal took place at the location where the automobile was

found by the FBI. Mr. Williams was cross-examined about this removal (R. T. pp. 280, 285), but the circumstances of the removal were not explored in detail.

Summarizing the evidence relative to the Corvair and the government's position, it is patently clear that this is a classic example of a legal search and seizure. A witness had watched a bank robber enter the "get-away" car and leave the scene. A full description of the vehicle was given to FBI agents who in turn broadcast it to other agents. One such agent located the "get-away" car abandoned not more than one half hour after the robbery. It fitted the description of the "get-away" vehicle and, was further connected with the robbery by the fact that a quantity of bread was observed in the back seat and a weapon had been concealed in a bread wrapper. Also, the license plate was taped concealing the automobile's real license plates.

The FBI and police officers were seeking to locate the bank robber who had used the vehicle. Therefore, the car was seized and the fingerprints removed.

Furthermore, a real concern in bank robbery cases, in addition to locating the robber, is the location of the money. Because the proceeds from a robbery can be easily hidden in a very short time it is incumbent upon law enforcement officials to locate the robber and the money as soon as possible. This is another reason for an immediate search of the appellant's automobile.

Therefore, the government would submit that considering the need for expediency relative to the location of the appellant and

the money, and because the law enforcement officials had probable cause to search the Corvair, the search and seizure of the Corvair was constitutionally permissible.

The court's attention is invited to the following cases to determine whether the search and seizure was reasonable, and, therefore, constitutionally valid.

Harris v. Stephens, 361 F. 2d 888 (8th Cir. 1966);

Burge v. United States, 342 F. 2d 408 (9th Cir. 1965), cert. denied, 382 U. S. 829, 86 S. Ct. 63;

United States v. Baxter, 361 F. 2d 116 (6th Cir. 1966), cert. denied, 385 U. S. 834, 87 S. Ct. 79;

Sirimarco v. United States, 315 F. 2d 699 (10th Cir. 1963);

Roach v. Mauldin, 277 F. Supp. 54 (N. D. Ga. 1967).

## K. GILBERT AND WADE SHOULD NOT APPLY TO PHOTO SPREADS

### 1. Failure To Raise The Point At Trial Should Waive It On Appeal

In reference to appellant's subheading "H" it must be mentioned, again, that the error asserted was not raised at trial and should therefore be deemed waived for the reasons cited supra. But, in the event that the court feels that the appellant has not waived this error, if one in fact exists, the government submits the following:

## 2. The Supreme Court Has Recently Declined To Rule On This Issue

The Supreme Court has recently declined to rule on whether Wade v. United States, 388 U.S. 218, 87 S. Ct. 1926 (1967), and Gilbert v. California, 388 U.S. 263, 87 S. Ct. 1951 (1967), apply to photographs shown to witnesses prior to trial, Simmons v. United States, 390 U.S. 377, 88 S. Ct. 967 (1968). The test set down in Simmons was based on the holding in Stovall v. Denno, 388 U.S. 293 (1967), and rests squarely on the consideration of each case to determine whether the use of the photographs denied the defendant due process of law. Specifically, there has to be a showing that the use of photographs was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. 390 U.S. 377, 384. Since the appellant did not directly raise this issue the government will dispose of it by requesting the court to examine the testimony of witnesses Charmaine Brindly (R. T. p. 113), Mary Brown (R. T. p. 147) and John Cartelli (R. T. p. 174), who answered questions relative to the photographs they saw. There is no showing on the record of any denial of due process and so Simmons, supra, should not apply. Compare Cline v. United States, 395 F. 2d 138 (8th Cir. 1968).

### 3. "Lineup" Errors Are Not Present In Photo Spreads

Specifically, on the Wade-Gilbert issue the government would submit that these cases should not be applied to photographs shown to witnesses prior to trial in the absence of a defendant's counsel. The chief concern of the Supreme Court in Wade, which laid down the primary holding, was the fairness of the "confrontation" (if a photograph spread can be deemed a confrontation). At 388 U.S. 218, 227, the court stated:

> "In sum, the principle of Powell v. Alabama and succeeding cases requires that we scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself. It calls upon us to analyze whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability of counsel to help avoid that prejudice." (Emphasis added.)

The court then went on to delineate why a "lineup" would deny the defendant a fair trial. The failure to have counsel present at the "lineup" denies the defendant any chance to prevent

fundamental fairness in the presentation of the lineup, and, further, and more importantly, would deny him the chance to point-up this unfairness at trial. At 388 U.S. 218, 230 the court stated:

> "[T]he Defense can seldom reconstruct the manner and mode of line-up Identification for judge or jury at trial."

Further, at 388 U.S. 218, 232 the court reemphasizes:

> "[T]he accused's inability effectively to reconstruct at trial any unfairness that occurred at the line-up may deprive him of his only opportunity meaningfully to attack the credibility of the witness's courtroom identification."

The court went on to hold that if in-court identification stemmed from an independent source or if the identification constituted harmless error there need not be a reversal, but in that case it could not be so determined. 388 U.S. 218, 242.

The problem in the "line-up" situation is just not present when photographs are used. The entire photo spread can be reproduced in court for the consideration of judge and jury. In such a case the defense counsel has free rein to cross-examine the witnesses as to their previous identification and relate it to their in-court identification. If the photo spread was in fact unfair, counsel can surely repair any damage and in fact thoroughly discredit a witness's identification by effective cross-examination. Therefore, the government would submit that the Wade-Gilbert

line of cases should not be applied to the use of photographs prior to trial.

### 4. The Use Of Witnesses Who Had Seen A Photo Spread Was Harmless Error In This Case

In any event, the government would submit that the use of the photographs prior to trial and the possible in-court identification that stemmed from them was harmless error in this case. Therefore, under the holding of Chapman v. California, 386 U.S. 18 (1966), this specification of error by the appellant should be dismissed.

At trial six eyewitnesses definitely identified the appellant as the man who robbed the bank in the postman's uniform. The testimony of a seventh, Wavellyn Calhoun (R. T. pp. 152-161), involved a great deal of description but, apparently, never an in-court identification. The six definite eyewitnesses arrayed against the appellant, who made in-court identifications, were Charmaine Brindley (R. T. p. 104), Mary Brown (R. T. p. 137), John Cartelli (R. T. p. 165), Ruthie Brown (R. T. p. 199), Campbell Thompson (R. T. p. 215) and Edward LeSage (R. T. p. 254). Of those six eyewitnesses only three of them testified that they had viewed photographs prior to trial of the appellant (Brindley ((R. T. pp. 113, 114)), Mary Brown ((R. T. p. 147)), and Cartelli ((R. T. p. 174)) ). Contrary to the assertion of appellant Mr. Campbell Thompson did not testify that he had seen photographs, in fact he

flatly denied it (R. T. pp. 222, 223). Therefore, there were three eyewitnesses (Campbell, Ruthie Brown and LeSage) who positively identified the appellant in court, but did not testify that they had viewed photographs prior to trial.

So the government exactly splits the difference with the appellant having half its eyewitnesses seeing photographs and half not seeing them. Therefore, the fact that three of the witnesses might be infected should not be cause for reversal in this case because it was a harmless error.

## L. APPELLANT WAS NOT PREJUDICED WHEN HE WAS ASKED AT TRIAL WHETHER HE WAS ADVISED OF HIS CONSTITUTIONAL RIGHTS, AND, THEREAFTER NO STATEMENT WAS INTRODUCED

### 1. Failure To Raise The Point At Trial Should Waive It On Appeal.

Again the ground that the appellant asserts in subheading "I" was not raised at trial in either an objection, or a motion to strike, or a request for the court to admonish the jury to disregard the defendant's testimony. Therefore, this ground should be deemed waived for reasons stated supra.

## 2. When The Subject Of The Admonition Arose The Court Properly Held A Hearing Outside The Presence Of The Jury

Very briefly, the question of the appellant being advised of constitutional rights arose at R. T. p. 389 and R. T. p. 392 before the jury. The defendant twice denied that he had been advised of his rights (R. T. pp. 392, 393). The court, obviously sensing that there was a question of whether appellant was advised, immediately had the jury retire (R. T. p. 393), and there ensued a lengthy hearing to determine whether he was so advised (R. T. pp. 393, 430). At the end of the hearing the Assistant United States Attorney stated that he did not intend to use any statements (R. T. p. 430). The jury then returned and the subject of the appellant's being advised of his rights never arose again.

First, it must be stated that courts are required, when a confession or statements of a defendant are about to be introduced into evidence before a jury, to hold a hearing outside the presence of the jury to determine the circumstances and voluntariness of the statements.

Jackson v. Denno, 378 U S. 368 (1964);

Sims v. Georgia, 385 U.S. 538 (1967);

Pinto v. Pierce, 389 U.S. 31 (1967);

Johnson v. United States, 390 F. 2d 517 (9th Cir. 1968).

It is quite clear that that is exactly what the court did in

this case, and no prejudice can be asserted by the appellant because the court did so. Further, the appellant cannot assert prejudice stemming from the fact that after the hearing the subject of the admonition of rights never arose again. If it had, then there might have been prejudice (See State v. Morgan, 182 Neb. 639, 156 N. W. 2d 799 (1967), cited by appellant at page 72 of his brief). Perhaps the defense counsel should have asked the court to strike the testimony of the appellant regarding the advising of rights, and requested that the jury be admonished to do so. But no such action was taken by defense counsel, probably for the simple reason that the testimony of the appellant was favorable to him. Having flatly denied that he had been advised of his rights, that is all that the jury heard (R. T. pp. 392, 393). The subject never arose again.

### 3. Appellant's Cases Are Distinguishable

The two Nebraska cases cited by the appellant (State v. Whited, 182 Neb. 282, 154 N. W. 2d 508 (1967); State v. Morgan, supra) are easily distinguished on their facts. In each case the jury heard that the defendant had been advised of his rights, and he then remained silent. The defendant sat mute after the discussion of the admonition and the trial proceeded on to other issues. The foundational questioning was left hanging like a pall over the defendant and in both cases the court stated that such testimony is irrelevant at best and tends to infer guilt if no statements are introduced. The court in State v. Whited at 154 N. W. 2d 508,

509-510 stated:

> "[T]he constitutional warnings are required as foundational proof for the admission of voluntary statements and confessions of a defendant. Where no statements or confessions are offered or received in evidence, the foundational requirements for such are not material and should be excluded or stricken from the evidence."

It must also be noted, to the detriment of the appellant, that the court in State v. Whited, supra, held that the issue of whether the defendant's constitutional rights were violated was not reviewable by the court because no objection was made at trial, exactly the situation in the present case.

In summary, it submitted that the court preserved the appellant's constitutional rights by holding a hearing out of the presence of the jury. The testimony relative to the advising of rights was only in favor of the appellant. No prejudice to the defendant can be found.

## M. THE JURY WAS CORRECTLY ADMONISHED TO DISREGARD THE IMPROPER INTRODUCTION OF APPELLANT'S MISDEMEANOR CONVICTION

The circumstances surrounding the appellant's assertions in subheading "J" are briefly stated. On cross-examination, the defendant was asked if he had been convicted of a felony and he

replied that it was a misdemeanor (R. T. 433). Thereafter, there was a discussion between court and counsel as to whether it was a misdemeanor and it was finally decided that it was (R. T. p. 434). The court then admonished the jury that they should disregard the fact that the appellant had been convicted of a misdemeanor (R. T. pp. 437-38), and added a supplemental remark (R. T. p. 439). The court asked the defense counsel if there was any objection to the admonition and the reply was in the negative (R. T. p. 438).

Apparently, now the appellant would have this Court reverse on the ground that the admission of the misdemeanor for impeachment was plain error under Federal Rule of Criminal Procedure 52(b), even though the matter was thoroughly discussed and ruled upon at trial.

1. The Jury Was Admonished

The government would strongly submit that under the circumstances there is no plain error. The court did admonish the jury at length and did all that it could to wash the subject from their minds. The subject of the trial court's admonitions to juries has been the subject of at least one appeal, and this Court has stated that they are sufficient to overcome any prejudice. Carroll v. United States, 326 F. 2d 72 (9th Cir. 1963). Also, counsel had an opportunity to further object, ask for a motion to strike or even ask for a mistrial, but no such action was taken. In fact, the defense counsel concurred in the admonition given by the court.

Everything was done that possibly could have been.

### 2. Failure To Object To The Admonition Of The Jury Waives The Right To Raise It On Appeal

If there is no plain error, the failure of defense counsel to ask for relief at trial waives the right to ask for it on appeal. A case in which inappropriate comments were made before the jury is Smith v. United States, 265 F. 2d 14, 18 (5th Cir. 1959) wherein the court commented:

> "Failure by trial counsel to make an appropriate motion for relief in such a situation leaves nothing to appeal from, for the appellate courts are for the purpose of reviewing errors of law caused by orders and rulings of the trial court."

Furthermore, the court is not required to rule on its own motion to strike evidence or declare mistrials when defense counsel does not make an appropriate motion. Ivory Collins v. United States, 390 F. 2d 260 (9th Cir. 1968).

Therefore, the government would submit that there is no error asserted by appellant in subheading "J" that would require reversal.

## N. THE JURY INSTRUCTIONS WERE PROPERLY GIVEN

### 1. The Court Need Only Give Instructions In Substance

The law relative to the issue raised by appellant concerning jury instructions given by the court is briefly stated.

> "A court is not bound to accept the language of a requested instruction proffered by counsel nor to give a proposed requested instruction if the court gives it in substance."
>
> Amsler v. United States, 381 F.2d 37, 52 (9th Cir. 1967).
>
> "If proper and adequate instructions are given, the defendant has no right to have his choice of language used in the way he prefers it."
>
> Rivers v. United States, 368 F.2d 362 (9th Cir. 1966).
>
> See also Shibley v. United States, 237 F.2d 327, 333 (9th Cir. 1956), cert. denied, 352 U.S. 873, 77 S. Ct. 94.

### 2. Failure to Object to the Instructions Waives the Point On Appeal

If a defendant, after an instruction has been given, fails to object to the instruction as being insufficient, improper, incorrect

etc., he waives any such objection.

White v. United States, 315 F. 2d 113 (9th Cir. 1963), cert. denied, 84 S. Ct. 58, 375 U. S. 821; Carroll v. United States, supra, at p. 84; Parente v. United States, 249 F. 2d 752 (9th Cir. 1957).

In regard to the last point the record reveals that the court, after completing its instruction turned to defense counsel and asked if there was "anything to take up with the court" (R. T. p. 706). No objection was heard and the appellant, therefore, should be deemed to have waived any objection he now makes.

### 3. The Instructions Were Given In Substance And So Were Proper

In the alternative, an examination of the instructions given by the court reveals that they comport with Amsler v. United States, supra, in that they were given in substance. The instruction regarding the consideration of each defendant individually (R. T. p. 698) is admittedly not straight out of Mathes and Devitt, Federal Jury Practice and Instructions, but it is a paraphrase of the Mathes and Devitt, Section 15. 04, and incorporates all the vital elements. Mathes and Devitt states "Each defendant is entitled to have his case determined from evidence" and the court stated "each defendant is entitled to your individual consideration on the facts in this case" (R. T. p. 698).

Likewise, the expanded alibi instruction given (R. T. pp. 694-

95) is merely a paraphrase of Mathes and Devitt, Section 8. 27. Using the plural noun rather than the singular can be interpreted as a way of phrasing the instruction. Otherwise, a separate instruction as to alibi would have had to have been given for each defendant. Further, the appellant seems to feel that the intelligence of the jury was so low that it could not determine that each defendant had a separate alibi, and that the instruction should be applied to each defendant individually. This is not supportable on any ground.

The instructions were not faulty, and, in any event, the appellant's failure to object precludes him from challenging them now.

## O. FEDERAL JUDGES MAY PARTICIPATE IN TRIALS

The contentions raised by the appellant in subheading "L" are also briefly answered. In the Federal courts, a trial judge is permitted to participate in the trial to the extent of commenting on the evidence and cross-examining of witnesses. If prejudice arising from such participation is alleged a full reading of the record is required.

Smith v. United States, 305 F. 2d 197 (9th Cir. 1962);

Carroll v. United States, supra.

Any possible prejudice to a defendant arising from the participation of a judge in the trial can be erased by careful admonitions and instructions to the jury.

King v. United States, 279 F. 2d 342 (9th Cir. 1960); Carroll v. United States, supra.

1. Jury Was Admonished To Disregard The Comments Of The Court

In the instant case the judge admonished the jury frequently that they should disregard any remarks that he made during trial and to form their own opinions from the evidence. In fact, he explained to the jury before any opening statements that "anything that this Court says is not to influence you in any way." (R. T. p. 78). The court told them to follow their own minds again before giving the jury instructions (R. T. p. 685), and gave instructions about the duty of the jury (R. T. pp. 688-89). Further instructions concerning the participation of the court in the trial were also given (R. T. p. 697).

It is patently clear that the jury was instructed at the beginning of the trial, and at its end to disregard any participation by the court in the trial, and no prejudice can be claimed by the appellant because of such participation.

P. DETERENCE IS A VALID FACTOR TO CONSIDER WHEN SENTENCING IN THIS TYPE OF CASE

Since the appellant has raised, at best, a collateral issue in subheading "N" the government will answer it quickly and so provide the court with "some guidelines for the judicial

determination of probation and sentence in such a case as this."

Punishment serves several purposes; retributive, rehabilitative, deterrent, and preventive. United States v. Brown, 85 S. Ct. 1707, 381 U. S. 437, 458 (1965). However, the ultimate goal of the criminal law is deterrence. Sauer v. United States, 241 F. 2d 640, 648 (9th Cir. 1957).

Therefore, the government submits that the court was not out of line when it considered the deterrence factor with such vehemence while sentencing the appellant.

## IV

## CONCLUSION

It is submitted by the government that for the above-stated reasons, the appellant should be denied relief on each and every point raised by him.

Respectfully submitted,

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